No. 637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, EXECUTOR UNDER THE WILL OF CLARENCE C. YOUNG, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE PETITIONER

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INDEX

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CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 17-27) is reported at 235 F. Supp. 941 (M.D. Pa. 1964). The opinion of the court of appeals and the dissent thereto (R. 38-59) is reported at 363 F. 2d 476.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1966 (R. 60). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the right in a widow to receive from a testamentary trust of her husband the sum of Three Hundred dollars ($300.00) per month for and during the period until his youngest child reaches the age of eighteen years, and thereafter the sum of Three Hundred Fifty dollars ($350.00) per month for and during the rest of her natural life, with the power to appoint all the remainder of the trust, qualified for the marital deduction as a "specific portion" of the trust within the meaning of Section 2056(b)(5) of the Internal Revenue Code of 1954.

2. Whether the provisions of Section 20.2056(b)-5 of the Treasury Regulations on Estate Tax (1954 Code) defining "specific portion" of the entire interest in property as a fractional or percentile share of such interest are in conflict with Section 2056(b)(5) of the 1954 Code and therefore invalid.

3. Whether, by use of a prescribed Treasury Department actuarial table, the present value of the "specific portion" of the trust can be feasibly computed in order to arrive equitably at a value to be used for estate tax purposes.

STATUTES AND REGULATIONS INVOLVED

Sections 2056(a), (b)(1), (b)(5), and (c) of the Internal Revenue Code of 1954 and portions of Treasury Regulations (1954 Code), §§ 20.2056(b)-5(a), (b), (c), (d) and (f) may be found in the Record, pp. 28-35. The most pertinent portion of the statute, § 2056(b)(5), provides that:

> [i]n the case of an interest in property passing from the decedent, if his surviving spouse is en-

> titled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest or such specific portion, to any person other than the surviving spouse * * *

the interest or such portion thereof shall qualify for the marital deduction.

STATEMENT

Clarence C. Young (the decedent) died testate on May 3, 1958, survived by his wife and four children. His last will and testament (R. 7-11) named the petitioner as executor and trustee of the estate. Item 6 of the decedent's last will and testament provides as follows (R. 8-9):

> I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have the power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.
>
> (a) I direct that my Trustee pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred dollars ($300.00) per month for and during the

period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty dollars ($350.00) per month for and during the rest of her natural life.

(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will.

The value of the testamentary trust passing under Item 6 of the decedent's will was $69,245.85, which was listed on the estate tax return by the taxpayer (petitioner) as qualifying for the marital deduction pursuant to Section 2056 of the Internal Revenue Code of 1954. The value of the property passing outside the will, to the decedent's spouse, $41,751.02, was combined on the estate tax return with the full value of the testamentary residuary trust, $69,245.85, to total $110,996.87. The adjusted gross estate was $199,749.96, and the taxpayer (petitioner) claimed a marital deduction in the amount of $99,874.98, constituting one-half of the adjusted gross estate. The Government eliminated the full value of the testamentary residuary trust from the marital deduction as claimed and thus decreased the amount of the allowable marital deduction to $41,751.02. The resulting deficiency in estate tax was paid, a claim for refund was disallowed, and this suit

for refund was instituted in the District Court (R. 4-15).

The District Court decided that the entire value of the trust corpus, $69,245.85, could not be considered for the marital deduction (R. 23). Instead, it decided that the taxpayer (petitioner) was entitled to deduct as a marital deduction the value of the present worth of the surviving spouse's monthly stipend. The value arrived at, $63,663.43, which was based upon a Treasury Department actuarial formula, was added to $41,751.02, the value of the property passing to the surviving spouse outside the will, to total $105,414.45, an amount in excess of one-half of the decedent's adjusted gross estate, $99,874.98, the maximum allowable statutory marital deduction (R. 26). The District Court thus concluded that the taxpayer (petitioner) was entitled to the full marital deduction of $99,874.98, and judgment was entered awarding the refund plus interest (R. 26-27).

The Government, thereupon, appealed the case to the Court of Appeals for the Third Circuit, which Court reversed the decision of the District Court, three judges dissenting (R. 38-59). The Third Circuit ruled that the value of the specific portion from which the wife would be entitled to all the income for life was not acceptably computed. It held that the specific portion need not be a stated fractional or percentile share, but that it is necessary that it be feasible to compute the amount of the specific portion, which, it felt, could not be done in this particular case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress originally enacted Code § 2056 permitting the marital deduction in order to equalize insofar as possible the effect of estate taxes in community property and common law jurisdictions. Section 2056(b)(5) was later enacted to permit the marital deduction benefit where a decedent creates a trust in favor of his surviving spouse whereby she would be entitled for life to all the income from the entire interest, or all the income from a *specific portion* thereof with a general power to appoint the entire interest, or such specific portion. Where such a marital deduction is allowed, the effect is to defer the estate tax on that property interest until the death of the surviving spouse, at which time such property interest would be included in that person's gross estate for tax purposes.

Section 2056(b)(5), as enacted, does not define the term "specific portion", whereas the Treasury Regulations § 20.2056(b)-5(c) defines specific portion as follows:

> "A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate. * * *"

The Third Circuit's majority in the case at bar casts some doubt upon the limitation adopted in the Regulations narrowing the right of the surviving spouse in income and as to the power to a fractional or percentile share (R. 50), while other courts, including the Second

and Seventh Circuits, have disapproved the limitation and have held the Regulations invalid.

The remainder of the widow's trust will be included in her gross estate upon her death for Federal Estate Tax purposes since she has a general power of appointment and Congress could not have had an intent to have its policy frustrated by a narrow limitation in the Regulations and thus put a double "tax bite" on what testator had built up—once, at his death, and again on the death of his spouse.

It has been held by this Court and other courts that qualification for the marital deduction is determined as at the date of the decedent's death. Yet, the majority opinion of the Third Circuit appears to go beyond this in an attempt to shore up its conclusion and negates this aspect when it says:

> "Thus, even done with precision, the time of the decedent's death is the inappropriate time at which to freeze the income production status of the invested corpus for purposes of qualifying a 'specific portion' for the marital deduction." (R. 51)

Reading the will of the testator demonstrates very clearly that the draftsman of the will and the testator who executed the same wanted to qualify the widow's trust for the marital deduction. Yet the majority opinion of the Third Circuit in order to buttress its conclusion finds other language in the will to find an intent of the testator to militate against the marital deduction.

In attacking the use of the actuarial table, in determining the spec fic portion, the majority opinion of the Third Circuit states that the factor of fund dissolu-

tion has in no way been contemplated by the decedent (R. 46). We submit that something is being read into the decedent's intent which the language of Item 6 in the will setting up the widow's trust dissipates. Item 6(a) of the will (R. 8-9) clearly provides that the Trustee is to pay to the wife of decedent out of income and corpus the sum of $300 a month until the youngest child reaches the age of eighteen years and $350 thereafter "during the rest of her natural life." Additionally, the wife is given the "power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal *remaining* at the time of her death." (emphasis supplied). Thus, it is difficult to comprehend how it can be said by the majority of the Third Circuit that "the factor of fund dissolution has in no way been contemplated by the decedent."

Had the draftsman of the will stated that the wife was to receive all of the income of the trust but no less than $300 a month, the majority of the Third Circuit probably would have ruled otherwise.

When the will is further analyzed, it will be found that the reasoning of the majority of the Third Circuit errs in finding the testator's intent to take away from the widow some of her rights. The attempt to sustain the Government's position by pointing to Paragraph 11 of decedent's will (R. 10) as being "consistent with both the decedent's intent as expressed in his will and the purpose behind the marital deduction provision," (R. 52) should abort. Firstly, the mere fact that decedent recited that the monthly stipends were to be used exclusively for the spouse's sole and individual use, maintenance and support does not prevent the spouse after she receives the same from doing with it

as she pleases. The fact that decedent "endeavored to make neither liable for any debts contracted by her, nor subject to her assignment" does not evidence "a desire to limit the survivor's control over the monthly stipend." There is no doubt that once she receives the same that she can do with it as she pleases and creditors may then come in. Nextly, the Treasury's Regulations clearly state in § 20.2056(b)-5(f)(7):

> "* * * An interest passing in trust will not fail to satisfy the condition that the spouse be entitled to all the income merely because its terms provide that the right of the surviving spouse to the income shall not be subject to assignment, alienation, pledge, attachment or claims of creditors."

The use of the prescribed Treasury Department actuarial table found in Estate Tax Regulations § 20.2031-7 in the case at bar to determine the present value of the "specific portion" of the trust is feasible. Courts have used actuarial tables, such as the one employed here. These tables have been widely used for Estate Tax purposes by the Commissioner of Internal Revenue and by taxpayers.

We submit that there are not convincing reasons why the actuarial table used by the District Court and the Seventh Circuit should not be used here. It does not appear that Congress would have intended otherwise in enacting § 2056(b)(5).

I

The right in a widow to receive from a testamentary trust $300 a month out of income and corpus with the power to appoint all the remainder of the trust qualifies for the marital deduction as a "specific portion" of the trust within the meaning of Section 2056(b)(5) of the Internal Revenue Code of 1954. The provisions of Section 20.2056(b)-5 of the Treasury Regulations on Estate Tax defining "specific portion" of the entire interest in property as a fractional or percentile share of such interest are in conflict with Code Section 2056(b)(5) and therefore invalid.

The Internal Revenue Code does not define what constitutes a "specific portion" of a trust corpus, but the Treasury Regulations § 20.2056(b)-5(c) define it as a "fractional or percentile share of a property interest." This restricted definition was disapproved by the Second Circuit in *Gelb* v. *Commissioner of Internal Revenue,* 298 F. 2d 544 (2d Cir. 1962). In *Gelb* a determinable portion of the trust corpus was given to the decedent's daughter for her support and education. The surviving spouse was entitled to all of the trust income and had the sole power to appoint all of the trust corpus except the portion which would be paid to the daughter. The court held that the value of the daughter's interest could be computed actuarially and carved out of the trust corpus, thereby leaving the widow a specific portion of the trust corpus which would qualify for the marital deduction.

In the case at bar, we submit that the issue presented is the converse of that in *Gelb.* Here, the widow had a power of appointment over the entire corpus but a right to only a fixed sum each month out of income and corpus. A portion of the trust corpus, the value of which would yield a fixed sum, was carved out of the total trust corpus and the District Court and the three dissenting judges of the Third Circuit held the same

to qualify for the deduction. The majority of the Third Circuit (five judges) questioned the actuarial approach, discussed *infra*, and concluded that no method of computation could feasibly compute the amount of the specific portion.

At the outset, let us look at the history of the marital deduction.

The marital deduction was first introduced into the estate tax law as Section 361 of The Revenue Act of 1948, 62 Stat. 110, which amended Section 812(e) of the Internal Revenue Code of 1939. The legislative history of the marital deduction and its revelation of Congressional intent[1] was reviewed by this Court in *United States* v. *Stapf,* 375 U.S. 118 (1963), speaking through Mr. Justice Goldberg, where it is stated at 375 U.S. 128:

> "Our conclusion concerning the congressionally intended result under § 812(e)(1) accords with the general purpose of Congress in creating the marital deduction. The 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions. Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent's estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, the marital deduction permits a deceased spouse, subject to certain requirements, to transfer free of taxes one-half of the non-community property to the surviving spouse. Although applicable to separately held property in a community property state, the primary thrust

[1] S. Rep. No. 1013, 80th Cong., 2d Sess., 1948-1 C.B. at pp. 305-306.

> of this is to extend to taxpayers in common-law States the advantages of 'estate splitting' otherwise available only in community property States. The purpose, however, is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus, the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate." [2]

There is inherent in this deduction provision the expectation that the property allowed as a deduction will be taxed in the estate of the transferee upon his or her subsequent death. Thus it is sometimes said that fundamentally postponement of the tax is contemplated so that if the full marital deduction is taken, the property of the marital community will be subject to tax only once in the estate of either spouse.[3]

The Act of 1948 also provided that an interest in property passing from the decedent in trust under which the surviving spouse is entitled to all of the income for life, payable at least annually, with power in the surviving spouse to appoint the entire trust corpus, would qualify for the deduction. The Act provided further that certain interests passing to the surviving spouse which would "terminate" upon a lapse of time or the occurrence or non-occurrence of an event or contingency would not qualify for the deduction. However, the legislation failed to provide for the situation

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[2] There is no doubt in the case at bar that there will be no transfer by the surviving spouse into succeeding generations which will be tax exempt. The balance remaining in the trust estate will be includable in the surviving spouse's gross estate.

[3] *Estate of Reilly* v. *Commissioner*, 239 F. 2d 797, 799 (3d Cir. 1957) reversing and remanding 25 T.C. 366. 4 Mertens, Law of Federal Gift and Estate Taxation § 29.01.

in which the surviving spouse received an interest not in trust or received less than all of the trust income or the power to appoint less than all of the trust property. To remedy this situation, Section 2056(b)(5) of the Internal Revenue Code of 1954 was enacted and provides, in part, that a life estate with power of appointment can qualify for the marital deduction to the extent that the surviving spouse is entitled for life to all of the income from a specific portion thereof with power in the surviving spouse to appoint such specific portion.

We repeat that while the Code itself provides no definition of the term "specific portion", Section 20.2056(b)-5(c) of the Treasury Regulations defines a specific portion as a fractional or percentile share of a property interest.

The government draws heart that the regulations definition is consistent with the example of a specific portion found in the committee reports to the 1954 Code.[4]

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[4] The Congressional reports state (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 92, A319 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4119, 4462; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 125, 475 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4759, 5119):

> The bill makes it clear that property in a legal life estate as well as property in trust qualifies for the marital deduction and that a right to income plus a general power of appointment over only an undivided part of the property will qualify that part of the property for the marital deduction . . .
>
> . . .
>
> For example, if the decedent in his will provided for the creation of a trust under the terms of which the income from one-half of the trust property is payable to his surviving spouse with uncontrolled power in the spouse to appoint such one-half of the trust property by will, such interest will qualify as an exemption from the terminable interest rule.

Also, see S. Rep. No. 1983, 85th Cong., 2d Sess., p. 241.

The mere fact that the Congress gives an example of a fractional part of one-half does not indicate that Congress did not intend to allow the marital deduction in a case of this type when it used the term "specific portion" in Section 2056(b)(5). Also, see *Gelb*, 298 F. 2d at 551.

We realize that: "Although the weight to be given to an interpretative rule varies with its statutory and legislative context, a Treasury Regulation is particularly persuasive when, * * * it is supported by declarations of congressional intent."[5] We submit, however, that Congress did not go to the length in expressing its intent as the Treasury seems to believe it did when the Treasury adopted the fractional or percentile definition. If such was the intent of Congress, it is reasonable to suppose that it would have used such words in § 2056(b)(5) rather than the broader term "specific portion". The Second Circuit Court of Appeals in *Gelb, supra,* (factually discussed in detail, *infra*), agreed, wherein it stated at 298 F. 2d 551, "[T]hat Congress gave a fractional interest as an example of a 'specific portion' does not warrant a construction that Congress did not mean to include other instances fairly within the language and the underlying policy. We *disapprove* Regulations . . . § 20.2056(b)-5(c) insofar as it would limit a 'specific portion' to a 'fractional or percentile' share" (emphasis added). This language was subsequently adopted and referred to by the District Court in the instant case, 235 F. Supp. at 946, and by the Seventh Circuit Court of Appeals in *Citizens National Bank of Evansville* v. *United States*, 359 F. 2d at 821. The Government has filed a Petition for a

[5] See f.n. 11, *United States* v. *Stapf*, 375 U.S. at 127.

Writ of Certiorari in *Citizens National Bank of Evansville,* No. 488.

In *Gelb,* the Second Circuit further stated, ". . . Congress spoke of a 'specific portion' not of a, 'fractional or percentile share', and nowhere indicated any policy that deductibility of a 'specific portion' should be governed by the possibility that the spouse's portion will change in value relatively more or less than the clearly nonqualifying part."[6]

The majority of the Third Circuit admits that the *Gelb* principles and disapproval of the Regulation "are appropriate to the facts of *that* case." The majority of the Third Circuit takes the position that "there is no need to take a position concerning the validity of that interpretative regulation, as it applies to this case." (R. 50)

This court speaking through Chief Justice Taney said in *United States* v. *Boisdore's Heirs,* 8 Howard 113, 122:

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[7]

The object and policy of the Congress in providing for the marital deduction has been well expressed by this Court in *United States* v. *Stapf, supra.*

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[6] Also see, *Allen* v. *United States,* 250 F. Supp. 155 (D.C.E.D. Mo., E.D. 1965).

[7] This was quoted with approval in *Mustro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270, 285 (1956), and *National Labor Relations Board* v. *Lion Oil Co., et al.,* 352 U.S. 282, 288 (1957).

II

The use of a Treasury Department actuarial table properly fixed the present value of the "specific portion" of the widow's trust as of the date of death of the testator. The attempt of the majority of the Third Circuit to read an intent of the decedent in his will which would frustrate the marital deduction is not supportable.

It should be noted that the formula used by the District Court, which was rejected by the majority of the Third Circuit is one prescribed by the Treasury Department in its Regulations on Estate Tax § 20.2031-7. The use of actuarial tables, such as the one employed, has been widely used for Estate Tax purposes by the Commissioner and by taxpayers and is a reasonable method by which one can place a present value on interests such as the one presented by this case. The extent of such use is clearly set forth in footnote 7 of the *Gelb* opinion, 298 F. 2d at 551, which reads as follows:

> The use of life expectancy tables was sanctioned by the Commissioner in the 1863 edition of "Boutwell's Manual" at p. 203, in the context of a group of regulations which, according to Carlton Fox, "appear to embody the first that were promulgated in respect of taxes on legacies." Since the federal succession tax enacted in 1862 was an inheritance tax, see Warren & Surrey, Federal Estate and Gift Taxation (1961 ed.), p. 2, it was necessary to value legacies individually, and for that purpose the 1863 regulations provided that remainders and life annuities should "be estimated by Carlisle's, or other approved tables of life annuities." As the regulations grew more elaborate, the Commissioner added examples to aid in applying the life tables "in ascertaining the values of life and reversionary interests," Instructions Concerning the Tax on Legacies, Distributive

Shares, and Successions, pp. 24-25 (Series 7-No. 3, 1878). The change to the estate tax concept in the Revenue Act of 1916, c. 463, 39 Stat. 756, and its immediate successor, the Revenue Act of 1918, c. 18, 40 Stat. 1057, was accompanied by contemporaneous acceptance of the use of life expectancy tables to value "annuities, life and remainder interests," art. 20, Regulations 37 (1919 ed.).

Introduction of the charitable deduction to the estate tax in § 403(a)(3) of the 1918 Act, 40 Stat. at 1098, led to instant acquiescence in the use of mortality tables to value charitable remainders, art. 53, Regulations 37 (1919 ed.). Perhaps their most frequent use in this area is to compute a gift to charity made subject to a life estate, see Merchants National Bank v. Commissioner, 320 U.S. 256, 259 [31 AFTR 753] fn. 6 (1943); Commissioner v. Estate of Sternberger, 348 U.S. 187, 190-192 [46 AFTR 976] (1955). The Supreme Court has even gone so far as to compel their use for such a computation when the life tenant had died before the case came to the Court, Ithaca Trust Co. v. United States, 279 U.S. 151 [7 AFTR 8856] (1929). See generally 4 Mertens, Law of Federal Gift and Estate Taxation (1959), § 28.30.

Other uses of mortality tables in Federal taxation are manifold. A typical application under the estate tax occurs if a vested remainderman dies before the life beneficiary, William Korn, 35 B. T. A. 1071 (1937). For purposes of the gift tax, they are used to value gifts of remainders, Henry F. duPont, 2 T. C. 246 (1943); Betty Dumaine, 16 T. C. 1035 (1951), and of life estates and annuities, F. J. Sensenbrenner, 46 B. T. A. 713 (1942). They have long been utilized to value annuities, not only for estate and gift tax purposes, but to allocate between return of capital and incremental return for income tax purposes. See GCM 8826, C. B. IX-2, p. 194 (1930); Florence

L. Klein, 6 B. T. A. 617 (1927); Guaranty Trust Co., 15 B. T. A. 20 (1929); Estate of Sarah A. Bergan, 1 T. C. 543 (1943). They are used also to derive the "adjusted uniform basis," the 1954 Codes' way of splitting basis between life tenant and remainderman in the event, for instance, either wishes to sell his interest while both are still alive. See Regs. § 1.1014-5(a)(1); 3A Mertens, Law of Federal Income Taxation (Zimet & Weiss rev. vol. 1958), § 21.71, at p. 200.

In *Gelb, supra,* the widow, under the residuary trust was entitled to at least $10,000.00 a year with principal to be invaded, if necessary. The widow was given the power to appoint the principal by will. The trustees (widow and son) were given the authority, in their discretion, to advance from the corpus, an amount not in excess of $5,000.00 a year for the support and education of the youngest daughter. To the Second Circuit, the specific portion could be determined after carving out the amount which could be diverted to the daughter and remanded the case to the Tax Court for actuarial calculation of the figure which could be diverted to the daughter from the corpus.[8]

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[8] The majority of the Third Circuit cites *Flesher* v. *United States,* 238 F. Supp. 119, 124 (N.D. W.Va. 1965) (f.n. 20, R. 52). However, the will of decedent Flesher provided for the son's maintenance and support in a manner consistent with his station in life. The widow was also to be provided for in a similar manner. The court in Flesher emphasized that the provisions for the widow are mentioned only secondarily. The widow-trustee had power to invade corpus for the son's maintenance and support as well as her own. Additionally, the widow did not have the power to dispose of or appoint the corpus of the trust by will because the decedent's will provided for a valid remainder over to named persons or to their heirs upon the death of the survivor of the widow or son. The power to invade for the son's benefit was not limited to a maximum figure as was done in *Gelb.*

The Second Circuit in *Gelb,* in referring to actuarial formulas, 298 F. 2d at 551, stated "the use of actuarial tables for dealing with estate tax problems has been so widespread and of such long standing that we cannot assume Congress would have balked at it here; the United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work."

The majority of the Third Circuit, we submit with due respect, misreads the will of the testator (R. 7-11) in attacking the actuarial approach. Additionally, we submit that it makes other errors in its negating an actuarial approach in this case.

The Third Circuit states that the fact that the formula used is one for valuing an annuity eliminates it as appropriate for determining "specific portion." The widow was to receive a monthly stipend out of income and corpus which was in effect an "annuity" to her. To the Third Circuit, the amount invested for a widow "at age forty-two will provide the annuitant the required monthly payments for her entire life. At death, the entire fund will have been dissipated. However, the factor of fund dissolution has in no way been contemplated by the decedent" (R. 46). We do not read testator's will that he "in no way contemplated" the possibility or even probability of fund dissipation. Item 6(a) of the will (R. 8-9) clearly provides that the trustee is to pay to the wife *out of income and corpus* the allotted monthly sum "during the rest of her natural life." Additionally, the wife is given the "power, exercisable by will, to appoint to her estate, or others, any or all of the principal *remaining* at the time of her death." (em-

phasis supplied) We find it difficult to understand how it can be said by the majority of the Third Circuit that "the factor of fund dissolution has in no way been contemplated by the decedent." The opposite intent of the decedent, we maintain, is expressed when the power to appoint given to the wife by her will is of the principal *remaining* at the time of her death. This is not an artificial element as the majority of the Third Circuit would have us believe.

Further, the majority of the Third Circuit reasons that if a stipend of $350 had been capitalized that it would result in a capital value figure in excess of the value of the entire trust corpus and "theoretically a sum in excess of the entire trust corpus will qualify" (R. 47). In such a situation the marital deduction would be limited to the actual trust corpus. It would be clear that the spouse was receiving all of the income of the specific portion and some principal.

The only beneficiary named in Item 6 of the will was the wife of decedent. She is to receive a monthly stipend out of income and corpus. The balance remaining of the principal is subject to the general power of appointment conferred upon her. Thus, we submit that she is in effect the virtual owner of the trust as contemplated by Congress.[9] Factually, we submit that this case is even stronger than *Gelb* which introduced into the trust another party—the daughter who was eligible for up to $5,000.00 a year for her support and education.

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[9] See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10.

In discussing Section 812(e)(1)(F) of the 1939 Code, the Senate Finance Committee Report (S. Rep. 1013, 80th Cong., 2d Sess. Part 2, p. 16 (1948) stated:

> "These provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust by or at the direction of the decedent, where the surviving spouse, by reason of her right to the income and a power of appointment, is virtually the owner of the property. This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse."

The fact that Item 12 of the will granted the trustee "the power to authorize payments over and above the monthly stipend up to $1,500 in the event of a serious illness or financial emergency affecting the surviving spouse" (R. 40; 50) does not work against the marital deduction. This provision is designed to take care of the widow and to permit the trustee to do so. The widow was the basic beneficiary of the trust set up in Item 6 of the will. Only after her death would others benefit and she could by will decide as to the takers. Here, too, the majority of the Third Circuit sees something in the will which should not militate against the marital deduction.

The approach taken by the majority of the Third Circuit is further weakened when it states (R. 51):

> "Thus, even if done with precision, the time of the decedent's death is the inappropriate time at which to freeze the income production status of the invested corpus for purposes of qualifying a 'specific portion' for the marital deduction."

This Court has held in *Jackson, et al.* v. *United States,* 376 U.S. 503 (1964), that qualification for the marital deduction, including a widow's allowance under state law, is determined as of the time of death. We see no reason why this ruling should not be applicable to the case at bar.[10]

The majority of the Third Circuit considers the Government's position as consistent with both the decedent's intent and the purpose behind the marital deduction provision (R. 52). It considers Item 11 of decedent's will (R. 10) as demonstrating a clear intent to "limit the survivor's control over the monthly stipend."

This reading of the will is manifestly erroneous. The mere fact that decedent recited that the monthly stipends were to be used exclusively for the spouse's sole and individual use, maintenance and support does not prevent the spouse after she receives the money from doing with it as she pleases. The fact that decedent "endeavored to make neither liable for any debts contracted by her, nor subject to her assignment" does not evidence "a desire to limit the survivor's control over the monthly stipend." There is no doubt that when she receives the stipend that she can do with it as she pleases and her creditors at this point could come against her. Additionally, this conclusion of the majority of the Third Circuit is exactly contrary to the Treasury Regulations which state in § 20.2056(b)-5(f)(7):

> "* * * An interest passing in trust will not fail to satisfy the condition that the spouse be entitled to all the income merely because its terms provide

[10] See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10.

that the right of the surviving spouse to the income shall not be subject to assignment, alienation, pledge, attachment or claims of creditors."

The dissenting opinion of the Third Circuit also answers the majority as follows (R. 58):

"The final point of the majority here is an attempt to extract, from paragraph 11 of the testator's will, an intent by him to 'limit the survivor's control over the monthly stipend', thus not making it akin to a fee simple.

"Paragraph 11 merely provides that the fund created for the wife is for her 'sole and separate use, maintenance and support' and not 'only that which he thought would be proper for her support and maintenance', as stated by the majority.

"As a matter of fact, this paragraph of the will has no real bearing on the issue here presented, for if the testator had provided a percentile interest for the wife, instead of a monthly stipend, this paragraph would have been equally applicable to it, so even if expressed in a percentile interest, the majority, taking the position they do here, would thus be defeating their own argument."

The majority of the Third Circuit questions the investment constant of 3½ percent (R. 48). This has been used in other estate tax situations.

In Estate of *Mary Fownes Tomec* v. *Commissioner,* 40 T.C. 134 (1963), the Tax Court determined the portion of the value of a trust created by decedent in which she retained the balance of trust income, after the payment of $2,500 income to each of her four children, to be included in the gross estate of the deceased—grantor for Federal estate tax purposes under the provisions of section 2036(a)(1) of the 1954 Code. The Tax Court

used the same method as used by the District Court in the case at bar provided in Section 20.2031-7 of the Estate Tax Regulations to carve out the portion of the trust corpus which would be excludable because of the $10,000 income payable to the children.

Mary Fownes Tomec, the decedent created an inter vivos trust providing for payment of $2,500 income to each of her four children and the balance to herself during her lifetime and upon her death the division of the corpus into trusts for the four children, or if her husband was living and at that time they were living together as husband and wife, into trusts for her children and husband. The agreement provided that in the event one of the decedent's children predeceased her leaving issue, the trustees in their absolute discretion might apply the $2,500 of such deceased child for the benefit of such deceased child's issue or any one of such issue, any such income in any year which was not paid to, or applied for the benefit of such issue during any year to be added to the principal of the trust estate. The trust provided for disposition of the trusts to be created upon the grantor's death in the event any or all of her children predeceased her and for the ultimate disposition of the trust corpus. It was held that the portion of the corpus necessary to produce $10,000 annual income is not includable in decedent's gross estate. It was also held in *Tomec,* that since the experience of the trust was less than 2 years and inadequate as a determination of the necessary portion of the corpus to support a $10,000 income that the amount of which 3½ percent is $10,000 as provided in Estate Tax Regulations, 26 C.F.R., Section 20.2031-7 should be used.

Furthermore, the $3\frac{1}{2}$ percent figure was not questioned in the District Court (R. 22—footnote 4)[11] as the Government contested the right to utilize any actuarial computation.

It is of interest to note that there appears to be an inconsistency between the regulation involved in the instant case and Section 20.2056(b)-6(c) of the Treasury Regulations on Estate Tax[12] which deals with the marital deduction on life insurance payments. There is a different wording in Regulations Section 20.2056(b)-6(c) which tends to relax the application of the Code to insurance,[13] as opposed to other property, where it should be equally relaxed.

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[11] "Neither side challenges the fact that by utilizing United States Life Table 38, with interest at $3\frac{1}{2}$ percent, the present worth of the right to receive $300 per month for the life of a person aged forty-two, which was the surviving spouse's age at the time of decedent's death, is $300 x 12 x 17.3911 x 1.0159 (factor for monthly payments) or $63,663.43. Of course, the government contests the right of the plaintiff to utilize any actuarial computations."

[12] § 20.2056(b)-6 *Marital deduction; life insurance or annuity payments with power of appointment in surviving spouse.*

* * *

(c) *Applicable principles.* (1) The principles set forth in paragraph (c) of § 20.2056(b)-5 for determining what constitutes a "specific portion of the entire interest" for the purpose of section 2056(b)(5) are applicable in determining what constitutes a "specific portion of all such amounts" for the purpose of section 2056(b)(6). However, the interest in the proceeds passing to the surviving spouse will not be disqualified by the fact that the installment payments or interest to which the spouse is entitled or the amount of the proceeds over which the power of appointment is exercisable may be expressed in terms of a specific sum rather than a fraction or a percentage of the proceeds provided it is shown that such sums are a definite or fixed percentage or fraction of the total proceeds.

[13] See *Estate of Reilly* v. *Commissioner*, 239 F. 2d 797 (3d Cir. 1957) reversing and remanding 25 T.C. 366.

The "variables" which the majority of the Third Circuit referred to should not be taken into consideration in the calculation of the value of the "specific portion". This is because the marital deduction *is* taken only once, at the death of the testator, and we can only concern ourselves with what is its value and not with what will happen. It is therefore unreasonable to assume that the method used by the District Court in calculating the specific portion is inconsistent or irreconcilable with the statutory requirement.

III

The intent of the Congress in enacting Section 2056(b)(5) in the net economic sense of providing for the marital deduction is frustrated by the holding of the majority of the Third Circuit.

In *Stapf, supra,* this Court looked to the net economic interest received by the surviving spouse and the tax effects of the construction given by the taxpayer and the majority opinion of the Court of Appeals for the Fifth Circuit. The construction given by the taxpayer was rejected by this Court since it would have permitted one-half of a spouse's wealth to pass from one generation to another without being subject either to gift or estate taxes. This result is considered squarely contrary to the concept of the marital deduction.

The marital deduction is generally restricted to the transfer of property interests that will be includable in the surviving spouse's gross estate.

Decedent's will in Item 6 provided for his widow. She was given a general power of appointment. Upon her death, the balance of the trust estate will be includable in her taxable gross estate. The majority of

the Third Circuit forgets this in its analysis. This is part of the rationale in *Stapf, supra.*

We submit that the intent of the Congress in enacting Section 2056(b)(5) of the Internal Revenue Code to provide a marital deduction is frustrated by the ruling of the majority of the Third Circuit in this case. Under its approach the estate is subject to an additional "tax bite" and upon the death of the widow the balance in the trust will also be subject to a "tax bite". Congress did not intend this whip-saw.

CONCLUSION

We submit that the decision of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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